

- (1) The nature and extent of claimant's injury and disability.

- (2) The liability of the Kansas Workers Compensation Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant is a 40-year old worker with a 15-year employment history with respondent. Claimant spent the first 12 years of her employment as an electrical wirer, a light-work job involving soldering, crimping and routing of wires. It was not considered to be a physical labor intensive job. In 1991 the electrical wiring job was eliminated and claimant was transferred to the plastic bench shop where she spent the last three years of her employment with respondent. The plastic bench mechanic job involved much heavier labor including pushing, pulling and cutting hard materials. Claimant was required to utilize scissors, carpet knives and was involved in prolonged standing.

The parties have stipulated that claimant met with personal injury by accident arising out of and in the course of her employment with the respondent on March 10, 1994. Claimant's employment and injury history, prior to the stipulated injury date, is significant. In April 1993, claimant was involved in an automobile accident suffering injury to her arms, shoulders and back. Claimant had specific treatment to her right arm and her right thumb and was prescribed physical therapy and a thumb splint. After this accident claimant was able to return to work at her regular employment.

In September 1991 claimant was pinned between a large machine and a steel post suffering injury to her back, left shoulder and left hip. After undergoing medical treatment claimant was again returned to her employment job duties as a plastic bench mechanic. At times, since 1991, claimant has had temporary medical restrictions placed upon her. Specifically, claimant had restrictions to her elbows, neck and upper extremities for a period of time. As of March 25, 1993, claimant had only one permanent medical restriction involving exposure to toxic fumes. It is significant that throughout claimant's employment history with respondent she was repeatedly treated at Boeing Central Medical for various injuries and complaints.

On March 10, 1994, claimant began experiencing severe pain in her arms, wrists and hands. These complaints were reported to Boeing Central Medical and claimant was initially referred to Dr. Fluter who treated her conservatively with physical therapy, icing, stretching, weights and ultra sound. She continued working while receiving these treatments. However, when the conservative care failed, claimant was referred to Dr. James L. Gluck, a board-certified orthopedist. Dr. Gluck first saw claimant on June 8, 1994. He elected to continue the conservative treatment through September 2, 1994 with anti-inflammatories, physical therapy and work restrictions. He diagnosed bilateral overuse, forearm tendinitis, left shoulder impingement, bilateral cubital tunnel syndrome, chronic low back pain and bilateral epicondylitis. Claimant was permanently restricted on August 3, 1994, from lifting over 40 pounds and limited overhead work and limited repetitive grasping. Claimant returned to work within these restrictions on August 15, 1994 as a plastic bench mechanic and worked until August 22, 1994, when she advised her employer she was unable to continue working due to her extreme pain. Claimant next saw Dr. Gluck on August 26, 1994, at which time he ordered a functional capacity evaluation [FCE] which was completed on September 2, 1994. The FCE recommended ten separate restrictions

which, when presented to respondent, were not acceptable to respondent. Claimant was advised that she could no longer perform the plastic bench mechanic job and, as there were no other jobs available within claimant's restrictions, claimant was terminated by respondent pursuant to a medical layoff.

Claimant was referred to Dr. Jane K. Drazek on October 28, 1994 for an independent medical examination. This referral was by Genex Rehabilitation Company, a company employed by respondent. Dr. Drazek diagnosed soft tissue injuries resulting in claimant's limited neck mobility, decreased strength bilaterally and tightness of the pectoralis. Dr. Drazek felt claimant's problems in her neck, upper back and right arm were most likely work related, given the nature of claimant's work and the significance of the complaints. Dr. Drazek recommended the restrictions listed in the FCE be followed, including no lifting of more than 15 pounds occasionally, 10 pounds frequently and required limited repetitive use of claimant's upper extremities.

In proceedings under the Workers Compensation Act the burden of proof shall be on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g).

K.S.A. 44-510e states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

After claimant's 1994 injury and the FCE evaluation done at Dr. Drazek's direction, claimant returned to respondent with specific restrictions. Respondent advised it was unable to accommodate claimant's restrictions and claimant was then terminated. As claimant is not engaging in any work for wages equal to 90 percent or more of her average gross weekly wage, claimant would be entitled to a work disability in this instance. See K.S.A. 44-510e.

The Appeals Board must first look to whether claimant has lost the ability to perform work tasks which claimant had performed in any substantial gainful employment during the 15-year period preceding the accident. As claimant spent the preceding 15 years working for respondent, the task loss analysis would involve only the jobs that claimant had been performing for respondent during this period.

Task loss opinions were provided by both Drs. Gluck and Drazek. Both physicians felt claimant had lost 75 percent of her task performing abilities when discussing the specific tasks of plastic bench mechanic. Dr. Gluck went on to opine that claimant had lost

43 percent of her ability to perform the electrical wiring job while Dr. Drazek felt claimant had lost 57 percent of her ability to perform the electrical wiring job. In reviewing the evidence in the record the Appeals Board finds no justification for placing greater emphasis on the opinion of one doctor over the other and finds that a combined average of the task loss opinions results in a finding that claimant experienced a 62.5 percent loss of task performing abilities.

The second component of the work disability equation requires a comparison of claimant's pre-injury average weekly wage with claimant's post-injury earnings. As claimant is unemployed the Appeals Board finds claimant has suffered a 100 percent loss of wages.

K.S.A. 44-510e requires claimant's loss of ability to perform work tasks be averaged with claimant's loss of wages. In averaging the two the Appeals Board finds claimant has suffered an 81.25 percent work disability as a result of the injuries suffered with respondent.

During claimant's course of treatment she was examined and treated on numerous occasions by Dr. Kenneth Zimmerman, a long-term employee at Boeing Central Medical. Dr. Zimmerman examined claimant after her industrial accident in September 1991 and, at that time, placed specific restrictions upon claimant limiting her overhead work, restricting pushing and pulling to less than 15 to 20 pounds, limiting standing to two hours out of four hours, limiting stair climbing and ladder climbing, and restricting work around fiberglass or composite dust. At various times in Dr. Zimmerman's deposition he describes these restrictions as either permanent or temporary. Dr. Zimmerman did testify that subsequent to claimant's 1991 injury she had a 5 percent whole body functional impairment.

K.S.A. 44-501(c) states in part:

"The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

The Appeals Board finds the respondent and the Kansas Workers Compensation Fund are entitled to a reduction in the award of claimant's preexisting functional impairment. Dr. Zimmerman's testimony finding claimant to have a 5 percent general body functional impairment preexisting the 1994 injury is adopted by the Appeals Board and the claimant's work disability award of 81.25 percent is reduced to 76.25 percent.

The Appeals Board must next consider the liability of the Kansas Workers Compensation Fund. The Administrative Law Judge found the Fund liable for 95 percent of all costs associated with this injury and assigned the 5 percent preexisting functional impairment of claimant's left upper extremity to the respondent. In so concluding the Administrative Law Judge found the uncontroverted medical testimony supported the findings that claimant would neither have developed the increased problems on her left upper extremity, nor would she have developed the conditions on the right "but for" her prior problems and injuries in the left upper extremity. The medical testimony of Dr. Zimmerman indicated claimant utilized her right upper extremity more to compensate for the injuries already present in the left upper extremity. It is further indicated that

claimant's left upper extremity problems worsened subsequent to her original problems in 1991 and 1993.

The testimony of Dr. Zimmerman is uncontradicted. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

K.S.A. 44-567(a) provides in part:

"An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows:

"(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury which occurs prior to July 1, 1994, and the administrative law judge awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers compensation fund

"(b) In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped in employment after acquiring such knowledge."

K.S.A. 44-566 defines handicapped employee as:

"(b) 'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions: . . .

"15. Loss of or partial loss of the use of any member of the body;

"16. Any physical deformity or abnormality;

"17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

It is not necessary that the employer's knowledge be of a particular and medically specific injury, that is if a lesion or a physiological change, giving rise to claimant's functional impairment. Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P.2d 98 (1987), aff'd 242 Kan. 430, 748 P.2d 420 (1988).

The Appeals Board, in adopting the uncontradicted testimony of Dr. Zimmerman, finds that the injuries suffered by claimant in both 1983 and 1991 resulted in claimant suffering physical impairment which would constitute a handicap in claimant's ability to obtain or retain employment. The Appeals Board further finds the uncontradicted testimony of Dr. Zimmerman supports a finding that "but for" claimant's preexisting physical impairment the resulting injury probably or most likely would not have occurred. As such, the Appeals Board finds 100 percent of the liability associated with this award should be assessed to the Kansas Workers Compensation Fund for the injuries suffered by claimant while in the employment of respondent on March 10, 1994.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated January 5, 1996 should be, and is hereby, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Debra D. Eaton, and against the respondent, Boeing Military Airplanes, and its insurance carrier, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund for an accidental injury which occurred March 10, 1994 and based upon an average weekly wage sufficient to allow the maximum payment of \$313.00 per week to claimant.

Claimant is entitled to 24.71 weeks of temporary total disability compensation at the rate of \$313.00 per week or \$7,734.23, followed by \$313.00 per week not to exceed a total award of \$100,000.00 for a 76.25% permanent partial general body disability.

As of May 14, 1996, there is due and owing claimant 24.71 weeks of temporary total disability compensation at the rate of \$313.00 per week or \$7,734.23, followed by 89 weeks of permanent partial general body disability compensation at the rate of \$313.00 per week in the sum of \$27,857.00, for a total of \$ 35,591.23, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$64,408.77 is to be paid at the rate of \$313.00 per week, until fully paid or further order of the Director.

Claimant is further entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical is awarded upon proper application to and approval by the Director of Kansas Workers Compensation Division.

The Kansas Workers Compensation Fund is assessed 100% of the liability in this matter and is ordered to reimburse respondent for 100% of any and all costs, fees and expenses associated with this claim.

Claimant's attorney fee contract is approved insofar it is not in contravention to K.S.A. 44-536.

The fees necessary to defray the expense of administration of the Workers Compensation Act are hereby assessed against the Workers Compensation Fund as follows:

Barber & Associates	
Deposition of Jane Drazek, M.D.	\$213.00
Deposition of Jerry D. Hardin	\$240.80

Deposition of James L. Gluck, M.D.	\$229.00
Transcript of Regular Hearing	\$194.85
Bannon & Standlee	
Deposition of Jane Drazek, M.D.	\$125.60
Deposition Services	
Deposition of Kenneth D. Zimmerman, M.D.	\$293.40
Deposition of Terry Stryker Merrifield, M.D.	\$112.00

IT IS SO ORDERED.

Dated this ____ day of June 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gregory G. Lower, Wichita, KS
Eric K. Kuhn, Wichita, KS
Andrew E. Busch, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director